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In The Supreme Court Of The United States

REGINALD A. WILKINSON, et al.,
Petitioners,

v.

HBRANDON LEE FLAGNER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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The State of Ohio seeks review of a Sixth Circuit decision that gives prison inmates new opportunities to challenge generally-applicable prison regulations, even after those regulations have been upheld in court. According to the court of appeals, the States must not only show that legitimate penological interests underlie any prison regulation that limits inmates' constitutional rights – a view that we certainly accept – but the States now must also show that any such regulation is appropriate for *each* inmate in light of that inmate's unique personal history and circumstances. That latter burden on prison officials' authority is new, and it finds no support in decisions of this Court or of the other circuit courts of appeals.

Respondent Flagner argues that he showed the courts below that Ohio has no legitimate penological interest in

enforcing a beard-length restriction for the State's prisoners. Yet that was not what the court of appeals said. If it were, then of course this case would indeed involve, as Flagner claims, a straightforward application of *Turner v. Safley*, 482 U.S. 78, 89 (1987), for that case requires the government to show a rational connection between its rights-infringing regulations on the one hand and the government's legitimate penological interests on the other.

The court of appeals did not conclude that Ohio lacks legitimate penological interests in enforcing a short-beard rule in the State's prisons, however. In other words, the court never said that Ohio prison officials are wrong in their view that long beards on inmates pose a general safety threat for prison guards and for other inmates. Indeed, the court of appeals had, in an earlier published decision, expressly approved Ohio's prison hair-length rule and the "legitimate penological interests" that support it. See *Pollack v. Marshall*, 845 F.2d 656, 659 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988).

Instead, the court of appeals said in this case that Ohio's beard-length rule, even if it advances legitimate penological interests in state prisons generally, may not be enforced against *this* prisoner, because state officials have not shown that *this* prisoner and *this* beard pose the kind of safety threat that the short-beard rule is designed to limit in the prison population as a whole. See Pet. App. 13a-14a, 21a (listing "several legitimate penological concerns" underlying Ohio's hair-length restrictions, but refusing to let state officials enforce those safety-driven rules against Flagner, since those officials "have not had any security problems" with him). It is that latter prisoner-specific twist on *Turner* that is new and that warrants review now, for as we showed in the petition, the other circuit courts of appeals have not

imposed on the government a similar obligation to justify each regulation anew for each prisoner.

In paragraph after paragraph, the court of appeals found no flaw in the connection between Ohio's asserted penological interests and the short-beard rule – the kind of connection that *Turner* requires – and yet agreed with Flagner that he nonetheless might be entitled to an exemption from the rule simply because state officials have not shown that he in particular poses a danger to others. See, e.g., Pet. App. 18a (acknowledging evidence that state prison officials have "recovered items such as tobacco, marijuana, and a razor blade from the hair of Ohio inmates," and yet discounting that legitimate penological concern because "with respect to Flagner specifically, no contraband has ever been recovered by prison staff during any search of his beard and sidelocks"); Pet. App. 19a-20a (noting that prison officials are concerned about the extra staff time and potential dangers that staff members might face during frequent searches of inmates' beards, but discounting those legitimate concerns because prison officials have not hired additional staff to search Flagner's beard in particular, and have not searched his beard often); Pet. App. 20a (citing evidence that restrictions on facial hair help prison officials control gang activity, and even acknowledging that "it may be true that the challenged grooming regulation, as a general matter, helps alleviate the proliferation of 'gang identifiers,'" but discounting that legitimate penological concern because "there is no evidence in the record that Flagner's beard and sidelocks have ever been mistaken for a 'gang identifier'"); Pet. App. 20a-21a (describing state officials' concern that bearded inmates can dramatically alter their appearance by shaving, and acknowledging that those changes could make any escapees harder to identify, yet discounting that concern because

"[w]ith respect to Flagner specifically, there is no evidence in the record that he has ever attempted to escape").

To be sure, Flagner points to cases in which this Court and others have called for an "as applied" examination of prison regulations. Yet in neither of the cases that he cites – *Thornburgh v. Abbott*, 490 U.S. 401 (1989), and *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998) – have the lower courts been directed, as in this case, to examine a general regulation as applied *to a particular prisoner*. Rather, both of the as-applied cases that Flagner cites involved prisoners' access to magazines, and the as-applied analysis dealt not with individual *prisoners* but with particular *publications*. That is, courts have not said "even if this issue of *Guns & Ammo* raises a security concern among the prison population as whole, is it safe for Prisoner X to receive it because he in particular has never tried to escape or to commit violent acts in the past?" That of course is the kind of approach that the court of appeals adopted in this case with respect to Ohio's short-beard rule.

Rather, both this Court in *Thornburgh* and the court of appeals in *Amatel* examined – and found valid on their face – prison regulations that gave federal officials the authority to keep out selected publications, and then both courts directed lower courts to examine whether particular publications were suitable or unsuitable for the prison population *as a whole*. See *Thornburgh*, 490 U.S. at 404-05 (upholding a regulation that allowed prison wardens to reject publications that were "detrimental to the security, good order, or discipline of the institution," and then remanding the case "for a determination of the validity of the regulations as applied to each of the 46 publications"); *Amatel*, 156 F.3d at 201 (doing the same for a ban on funding for sexually explicit materials in federal prisons, and rejecting a "detailed

prisoner-by-prisoner . . . sifting to determine whether a particular publication will harm the rehabilitation of a particular prisoner"), *cert. denied*, 527 U.S. 1035 (1999).

Unlike those bans on selected publications – which permitted prison officials to designate some magazines as appropriate and others not, and therefore called, as this Court said in *Thornburgh*, for an as-applied weighing of each publication – Ohio's rule for beards imposes an across-the-board ban on facial hair longer than one-half inch. There is no as-applied component to a short-beard rule as there is and must be in any rule limiting the wide variety of incoming magazines at a prison. Yet, despite the seeming legitimacy of the Ohio rule's limit on beards for all inmates, the court of appeals held that Ohio may not enforce the rule against Flagner unless the State also shows that he in particular poses a special danger by wearing a long beard. That extra burden of proof on the government is one that no federal court has ever imposed under *Turner*, and it is one that is squarely at odds with the deference that *Turner* and other cases have given prison officials in "the volatile prison environment." *Thornburgh*, 490 U.S. at 413.

Flagner claims that the Ohio beard-length rule is an "exaggerated" response to the legitimate security concerns voiced by the State's prison officials about long beards. But nothing in his brief in opposition, or in the Sixth Circuit's opinion, suggests that the response is an exaggerated one for the prison population as a whole. That ought to end the matter, for this Court has already said that a response is not "exaggerated" if prison officials "have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm." *Thornburgh*, 490 U.S. at 419. That is just what Ohio officials have done by setting beard lengths at one-half inch and no more, and that rule is an

appropriate one for the prison environment, given the concerns about "[q]uick identification [of escapees], removal of a place to hide small contraband, [and] prevention of sanitation problems" that the court of appeals itself described as "legitimate penological concerns" in an earlier opinion. Pet. App. 13a-14a (quoting *Pollack v. Marshall*, 845 F.2d 656, 659 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988)). As we noted in the petition at 10, every other circuit that has considered prison hair-length regulations has agreed.

Despite the apparent reasonableness of the beard-length rule generally, however, Ohio now cannot enforce the rule unless state officials show that anyone who objects to the rule – like Flagner – poses a special security risk by wearing a long beard. Ohio cannot, in other words, proactively anticipate security problems, but must instead wait until each prisoner hides weapons or tries to escape before we may demand compliance with rules that advance our reasonable penological objectives. That burden on the government to justify in federal court the enforcement of each prison rule on an inmate-by-inmate basis poses dangers to prison staff and other inmates alike, and it turns on its head the notion that "prison administrators . . . and not the courts [are] to make the difficult judgments concerning institutional operations." *Turner*, 482 U.S. at 89 (citation omitted).

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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